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Nos. 05-380 and 05-1382

›upreme Court of the United States

TO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

LEROY CARHART, ET AL.

TO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

› PARENTHOOD FEDERATION OF AMERICA,
INC., ET AL.

ON WRITS OF CERTIORARI
HE UNITED STATES COURTS OF APPEALS
OR THE EIGHTH AND NINTH CIRCUITS

:PLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondents' primary submission in these cases is that, in enacting the Partial-Birth Abortion Ban Act of 2003, Congress sought to overturn this Court's decision in *Stenberg* v. *Carhart*, 530 U.S. 914 (2000). The Act itself belies that submission. To the contrary, it is clear that, in devising the Act, Congress sought to comply with *Stenberg* and to remedy both of the constitutional deficiencies that this Court identified in *Stenberg*. First, Congress made detailed factual findings concerning the medical necessity of partial-birth abortion, and determined, based on those findings, that a statutory health exception was unnecessary. Second, Congress incorporated a narrower, more precise definition of partial-birth abortion, which was tailored to exclude the more common standard D&E abortion procedure. Congress's considered effort to meet the requirements of *Stenberg*, while exercising its well-established factfinding capabilities, in no way intrudes on the prerogatives of this Court, but instead represents a healthy exercise of the separation of powers.

For those reasons, and the reasons discussed in petitioner's opening briefs, *Stenberg* does not require invalidation of the Act, which denies no woman the ability to obtain a safe abortion and instead takes only the limited step of proscribing a rarely used and inhumane abortion procedure resembling infanticide. A contrary conclusion would have enormous implications for the ability of Congress to address an issue of grave medical and moral concern to most Americans. It would put courts in the difficult and institutionally problematic role of second-guessing congressional judgments about medical facts, and mark a return to the days in which abortion regulations—even those not preventing women from obtaining a safe abortion—were subject to the strictest of scrutiny. The invalidation of the Act would betray the lesson of the

joint opinion in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), which rejected strict scrutiny and sanctioned various abortion regulations short of an outright ban. Moreover, acceptance of respondents' broader argument that partial-birth abortion is beyond regulation would betray *Stenberg* itself, which acknowledged that, as Justice O'Connor stressed in her concurring opinion, the inhumane and widely condemned practice of partial-birth abortion could constitutionally be prohibited in appropriate circumstances.

I. THE ABSENCE OF A HEALTH EXCEPTION DOES NOT RENDER THE ACT FACIALLY INVALID

A. *Stenberg* Did Not Adopt A Rule Of Virtual Per Se Invalidation For Abortion Regulations Lacking A Health Exception

Respondents in these cases urge the Court to read into *Stenberg* a rule of virtual per se invalidation for abortion regulations lacking a health exception. That proposed rule is inconsistent both with this Court's abortion precedents and with generally applicable principles of law.

Respondents contend that, under this Court's decision in *Stenberg*, it is sufficient for a plaintiff challenging a statute that lacks a health exception merely to point to "substantial medical authority" that suggests that the statute would create significant health risks (even if it would not prevent any woman from obtaining an abortion). See, *e.g.*, Carhart Br. 21-23; Planned Parenthood Br. 11-14. Respondents do not deny that, under their view, a plaintiff need not show that the preponderance of the evidence supports the proposition that the statute at issue would create significant health risks; instead, they concede only that a plaintiff must come forward with something more than "a lone expert, making bald assertions with no support." Carhart Br. 21.

Stenberg certainly does not purport to impose such a hair trigger for invalidating abortion regulations, and such an interpretation of *Stenberg* would effectively put that decision into conflict with the Court's earlier abortion decisions. Most notably, in *Casey*, the Court held only that it would be unconstitutional for the government to prohibit or restrict abortion where the regulation at issue would "interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." 505 U.S. at 880. *Casey* considered the health risks from regulations that might delay an abortion and prolong a pregnancy, not the marginal health risks of two alternative abortion procedures in circumstances in which women would continue to have access to at least one safe procedure. But even in that context, *Casey* in no way indicated that the relevant constitutional inquiry was whether there was merely a *division of medical opinion* on the existence of a threat. Cf. *ibid.* (noting that it was "undisputed" that certain specified conditions could require an emergency abortion). Indeed, the joint opinion in *Casey* criticized the Court's earlier decision in *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (*Akron I*), for placing too much weight on the views of an individual physician when they deviated from the best judgment of the legislature. 505 U.S. at 881-887; see *Stenberg*, 530 U.S. at 969-970 (Kennedy, J., dissenting).

More broadly, respondents' standard—entitling them to judgment based on the testimony of competing experts—is antithetical to normal modes of procedure and ignores both the important countervailing government interests and the dramatic consequences of facial invalidation of a duly enacted statute. Merely identifying a dispute over a material fact is generally enough to survive a motion for summary judgment, not enough to prevail in a facial challenge. And a rule that allows the views of a minority of medical experts to trump the

considered views of Congress devalues the important government interests recognized in *Casey*. As the dissenters in *Stenberg* noted, such a rule would be tantamount to a requirement that every abortion regulation contain an express health exception, because "there will always be *some* support for a [banned] procedure and there will always be some doctors who conclude that the procedure is preferable." 530 U.S. at 1012 (opinion of Thomas, J.); see *id.* at 969 (opinion of Kennedy, J.) (noting that "[t]he standard of medical practice cannot depend on the individual views of [the plaintiff] and his supporters"). In *Stenberg*, the Court neither explicitly nor implicitly adopted such a per se rule. Under the analysis actually applied in *Stenberg*, the Act is clearly constitutional.[1]

B. When Analyzed Under The Proper Standard, The Record Overwhelmingly Supports Congress's Judgment That No Health Exception Was Required

1. Congress's Findings On The Medical Necessity Of Partial-Birth Abortion Are Entitled To Deference

Respondents do not seriously dispute the general proposition that courts should afford a high degree of deference to

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[1] Respondents do not attempt to defend the Ninth Circuit's holding that, under *Stenberg*, the appropriate *constitutional* inquiry is whether "there is a medical consensus that *no circumstance exists* in which the procedure would be necessary to preserve a woman's health." 05-1382 Pet. App. 15a (emphasis added). Even respondents seem to recognize the implausibility of such a rule, which in the facial challenge context would turn the applicable standard entirely on its head. Moreover, while respondents describe application of the "large fraction" standard for facial challenges applied to the spousal-notification provision at issue in *Casey* as "chillingly callous," Planned Parenthood Br. 13, nothing in *Stenberg* suggested that the Court was adopting a new, substantially more permissive rule for facial challenges, and there is nothing callous about requiring a plaintiff who seeks invalidation of a statute *in all its applications* to show that the statute is unconstitutional in all, or at least a large fraction, of those applications.

congressional factual findings that inform the constitutionality of federal statutes. See, *e.g.*, *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195 (1997) (*Turner II*). Instead, respondents offer a variety of arguments as to why Congress's findings here on the medical necessity of partial-birth abortion are not entitled to deference. Those arguments lack merit.

a. Respondents repeatedly contend that Congress was seeking to "circumvent the constitutional rule established in *Stenberg*," Planned Parenthood Br. 24, or to "alter the meaning and scope of substantive constitutional rights," Carhart Br. 24. Congress's findings in the Act, however, do not take issue with the constitutional rule identified by this Court in *Stenberg*. Rather, Congress took that rule as its starting point and merely made findings relevant to that rule. See, *e.g.*, Act § 2(3), 117 Stat. 1201. Congress's findings—including its ultimate and most relevant finding that it is never medically necessary for a mother to undergo a partial-birth abortion—certainly bear on the application of the constitutional test articulated by this Court in *Stenberg*. But Congress's unobjectionable effort to comply with this Court's precedents is a far cry from an effort to defy those precedents. These cases are thus readily distinguishable from cases in which Congress sought to alter the constitutional rule of decision laid down by this Court, see *Dickerson* v. *United States*, 530 U.S. 428 (2000); sought to replace a constitutional ruling of this Court with a different substantive rule of decision under Section 5 of the Fourteenth Amendment, see, *e.g.*, *City of Boerne* v. *Flores*, 521 U.S. 507 (1997); or made findings that were insufficient as a matter of law to sustain Congress's exercise of a constitutional power, see *United States* v. *Morrison*, 529 U.S. 598 (2000).[2]

[2] Respondents and their amici repeatedly note that some supporters of the Act made statements critical of the Court's decision in *Stenberg*. See, *e.g.*, Carhart Br. 1; Fifty-Two Members of Congress Br. 2, 4. But the views of

Respondents suggest that "[e]xtension of * * * deference to this case would effectively provide Congress with carte blanche to violate the Constitution simply by making carefully chosen 'findings.'" Carhart Br. 24. Respondents, however, simply overlook the fact that, while congressional factual findings are entitled to substantial deference, see *Turner II*, 520 U.S. at 195, that deference does not amount to a blank check. Where Congress's findings are plainly not supported by substantial evidence, or where Congress's findings amount to legal conclusions, courts remain free to disregard those findings. See *ibid.*; *Lamprecht* v. *FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992) (Thomas, Circuit Justice) (rejecting proposition that "a legislature could make a statute constitutional simply by 'finding' that black is white or freedom, slavery").

b. In a similar vein, respondents suggest that Congress was foreclosed from "making contradictory findings" to those made in the *Stenberg* litigation. Carhart Br. 31. But it is unclear exactly which argument respondents embrace. Respondents appear reluctant to defend the Eighth Circuit's conclusion that, because the medical necessity of partial-birth abortion was a "legislative" fact, *Stenberg* foreclosed Congress from making findings on that question (except on the basis of new evidence). See 05-380 Pet. App. 16a-20a. That reluctance is understandable. Deference to Congress's superior fact-finding function is appropriate precisely for such "legislative" facts, and, in any event, there is little evidence to support the premise that, in *Stenberg*, this Court was making "legislative" factual findings of its own. To the contrary, the Court repeatedly relied on the evidence presented to, and the factual find-

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individual legislators concerning the relative merits of this Court's precedents hardly taint their votes or undermine legislative efforts to comply with decisions with which some members may disagree. Moreover, the relevant focus is on the findings *of Congress*, not the views of individual legislators.

ings made by, the district court. See, *e.g.*, *Stenberg*, 530 U.S. at 931-932, 934, 936-937.

It cannot be that the case-specific factual findings of a single district judge, even when reviewed under an appropriately deferential standard by this Court, somehow foreclose Congress from making its own, truly "legislative" factual findings, based both on its superior institutional capacity to make such findings and, in this instance, on a fuller and updated evidentiary record. See Act § 2(5), 117 Stat. 1202.[3] Such a rule would effectively convert the Judiciary's power "to say what the law is," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), into a power to say what the law *and facts* are, even when those facts pertain to an appropriate subject of legislation. Nothing in our Constitution or this Court's precedents supports that view. Instead, the Legislative Branch is plainly authorized to engage in its own factfinding, and is the branch best situated to collect the full range of relevant data and evaluate it from a broad spectrum of perspectives. Congress

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[3] Respondents repeatedly contend that Congress's factual findings should not receive deference because Congress made those findings based on "virtually the same factual record that informed this Court's decision in *Stenberg*." Carhart Br. 15; see *id.* at 19 & n.12; Planned Parenthood Br. 4-5 & n.6. Even if it were true that Congress did not consider any new evidence, Congress would not be foreclosed from revisiting the factual findings made by the district judge in *Stenberg* and making contrary findings of its own. Deference to congressional factual findings is based not just on Congress's superior capacity to root out raw data, but also on its ability to analyze that data more thoroughly and through the perspectives of elected officials representing diverse views and constituents across the Nation. See p. 10, *infra*. In any event, Congress did consider additional evidence in making its findings. Specifically, Congress held two post-*Stenberg* hearings in which it heard testimony from two physicians, Dr. Kathi Aultman and Dr. Mark Neerhof, who had not previously testified, see 05-1382 C.A. E.R. 578-586, 604, 862-866; heard testimony from a third physician, Dr. Curtis Cook, who had previously testified but on different topics, compare *id.* at 597-618 (2002 testimony) with *id.* at 544-546, 550-551 (1997 testimony); and received new documentary evidence.

does not lose that authority just because a court makes factual findings first in a particular case. Just as an agency does not lose its ability to resolve statutory ambiguities because a court construed the statute before an authoritative agency construction, see *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 125 S. Ct. 2688, 2700-2702 (2005), Congress does not lose its ability to find facts and legislate because of prior litigation.

c. Respondents contend that, even if courts should generally afford a high degree of deference to congressional factual findings, they should not do so "where the case requires the application of heightened scrutiny to violations of fundamental substantive rights." Carhart Br. 29. In *Turner II*, however, this Court deferred to Congress's express finding that statutory provisions requiring cable-television systems to carry local stations were necessary to preserve those stations in upholding those provisions under the First Amendment, applying the heightened (intermediate) scrutiny afforded to content-neutral regulations. See 520 U.S. at 196. Similarly, in *Board of Education* v. *Mergens*, 496 U.S. 226 (1990), a plurality of the Court (in reasoning with which none of the other Justices directly disagreed) deferred to Congress's finding that high school students were unlikely to confuse an equal-access policy with state sponsorship of religion in concluding that the Equal Access Act did not have the primary effect of advancing religion (and was thus valid under the Establishment Clause). See *id.* at 251. Those cases confirm that the degree of deference owed to congressional findings does not turn on the right at issue or the applicable level of scrutiny.[4]

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[4] In contending that congressional findings are not entitled to deference where heightened scrutiny is involved, respondents primarily rely on this Court's decisions in four First Amendment cases: *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978); *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115 (1989); *Ashcroft* v. *Free Speech Coalition*,

d. Finally, respondents contend that Congress's findings concerning the medical necessity of partial-birth abortion are not entitled to deference because Congress has no particular institutional expertise in that area. See, *e.g.*, Carhart Br. 31-32. Congress, however, has long exercised its authority under the Commerce Clause to regulate various aspects of medical practice—whether directly through its regulation of the sale, composition, and labeling of drugs (and the use of medical devices), see Federal Food, Drug & Cosmetic Act, 21 U.S.C. 301 *et seq.*; Controlled Substances Act, 21 U.S.C. 801 *et seq.*, or indirectly through its provision of funding for various types of medical expenses, see Social Security Act, 42 U.S.C. 301 *et*

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535 U.S. 234 (2002); and *Randall* v. *Sorrell*, 126 S. Ct. 2479 (2006). In *Landmark*, however, this Court merely refused to defer to a *state* legislature's essentially legal conclusion that the divulgence of confidential information would pose a clear and present danger to the orderly administration of justice. See 435 U.S. at 843. In *Sable*, the Court rejected a request for deference on the ground that "the congressional record contain[ed] no legislative findings" pertinent to the constitutional question presented. See 492 U.S. at 129. *Landmark* and *Sable*, moreover, have since been cited only for the modest proposition that "[the fact] [t]hat Congress' predictive judgments are entitled to substantial deference does not mean * * * that they are insulated from meaningful judicial review altogether." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 666 (1994) (*Turner I*) (plurality opinion). In *Free Speech Coalition*, the Court did not explicitly refuse to defer to congressional findings at all (and, to the extent that it did so implicitly, did so only on the ground that any congressional findings were legally irrelevant). See, *e.g.*, 535 U.S. at 253, 254. Finally, in *Randall*, the plurality opinion concluded only that, while legislatures had considerable leeway to make "empirical judgments" with regard to campaign-finance regulations, courts were required to exercise "independent judicial judgment" when "assessing [a] statute's 'tailoring,' that is, * * * assessing the proportionality of the [statute's] restrictions." 126 S. Ct. at 2492. In the end, the Court's decision, on occasion, to reject a statute even under a deferential review of legislative factfinding does not amount to a determination that deference is inappropriate in the first place, any more than a conclusion that an agency's interpretation of an ambiguous statute is unreasonable would amount to a determination that deference to the agency is inappropriate.

seq. And this Court has repeatedly deferred to Congress's findings on legislation involving medical matters. See, *e.g.*, *Jones* v. *United States*, 463 U.S. 354, 363-366 & n.13 (1983); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 33-34 (1976); *Lambert* v. *Yellowley*, 272 U.S. 581, 588-597 (1926). In any event, the principle of deference to congressional factual findings does not turn on a court's assessment of Congress's true level of expertise regarding a particular subject, but is instead based more generally on Congress's superior institutional ability to "amass and evaluate * * * data bearing upon legislative questions," *Turner II*, 520 U.S. at 195 (internal quotation marks omitted), as well as its constitutional responsibility to "weigh[] conflicting evidence in the legislative process," *id.* at 199. That capability surely exceeds the factfinding powers of a single district judge.

2. *Congress's Findings Are Supported By Substantial Evidence*

Respondents prefer to focus on subsidiary findings and mistaken arguments that Congress's findings here do not enjoy the normal deference, rather than making a serious effort to challenge Congress's ultimate and most relevant finding that "partial-birth abortion is never medically indicated to preserve the health of the mother," Act § 2(14)(O), 117 Stat. 1206, under the deferential standard set out in *Turner II*. To the extent that respondents do take issue with Congress's ultimate finding, their effort to undermine it is unavailing.

a. Respondents primarily rely on the district courts' findings in their respective cases that substantial medical authority supported the proposition that partial-birth abortion was sometimes medically necessary, contending that those findings are entitled to deference (and indeed are reviewable only for clear error). See, *e.g.*, Carhart Br. 2-3, 5, 21-23; Planned

Parenthood Br. 14-24. That contention is erroneous, however, both because it misapprehends the applicable legal standard, see pp. 2-4, *supra*, and because it turns well-established principles concerning Congress's superior factfinding capacity on their head. The constitutionality of nationwide legislation properly depends on the credibility judgments of Congress, not those of individual district court judges, which of course can vary. And deference to congressional factfinding does not become inapplicable simply because a district court hears witnesses who did not testify before Congress.[5]

b. To the extent that respondents attempt to come to terms with Congress's factual findings, they primarily attack Congress's *subsidiary* findings. See, *e.g.*, Planned Parenthood Br. 26-29. The relevant legal question before this Court, however, is not whether *all* of Congress's findings, including those that do not bear directly on the underlying legal question, are supported by substantial evidence. Instead, it is whether substantial evidence supports Congress's *ultimate*, and most relevant, finding that "partial-birth abortion is never medically indicated to preserve the health of the mother." Act § 2(14)(O), 117 Stat. 1206. By focusing on Congress's other findings, respondents commit the same error as the courts below, which (based on their misreading of *Stenberg*) asked only whether substantial evidence supported the proposition that there is no division of opinion as to whether partial-birth abortion is medically necessary in some

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[5] Where a reviewing court has before it evidence that was not before Congress, it can consider that evidence in engaging in "substantial evidence" review. See *Turner II*, 520 U.S. at 195. The relevant question, however, is not whether the reviewing court would reach the same determination as Congress based on the record as supplemented; instead, it is whether there is sufficient evidence to suggest that Congress's determination was reasonable in the first place. See, *e.g.*, *id.* at 210-211; *Rostker* v. *Goldberg*, 453 U.S. 57, 82-83 (1981).

circumstances. See, *e.g.*, 05-380 Pet. App. 460a-461a; 05-1382 Pet. App. 15a.

c. Substantial evidence supports Congress's key findings, including its ultimate finding concerning the medical necessity of partial-birth abortion. The starting point for the "substantial evidence" inquiry is the evidence that was actually before Congress when it made its findings. As petitioner's opening briefs in these cases explain, numerous physicians who appeared before Congress testified that there were no circumstances in which partial-birth abortion was the only appropriate type of abortion; that partial-birth abortion offers no safety advantages over other types of abortion; and that partial-birth abortion presents various safety risks that other abortion procedures do not. 05-380 Br. 31-33; 05-1382 Br. 22. Respondents' only answer to that testimony is the unelaborated assertion that "[n]one of th[o]se physicians are experts in second-trimester surgical abortion, and several, if not all, oppose abortion by any method." Planned Parenthood Br. 29 n.24. That does not suffice.

While it is true (and unsurprising) that none of the physicians who believed that the partial-birth abortion procedure was unnecessary and posed health risks had ever personally performed such an abortion, all of those physicians were experienced obstetricians, and some were maternal-fetal experts who specialized in treating women with high-risk pregnancies (and therefore could readily assess the risks that would attend particular types of abortion procedures). And while at least some of those physicians may be opposed to abortion more generally, it does not follow that those physicians would be biased in their assessment of the *comparative* risks presented by different abortion methods. Because Congress could readily have concluded that those physicians were credible witnesses, there is no basis for discounting their testimony in assessing the validity of Congress's findings.

Congress's findings concerning the medical necessity of partial-birth abortion, moreover, were supported not only by the testimony of those physicians who testified before Congress, but also by (1) other evidence in the legislative record, including statements from leading physician groups, articles in medical journals, and written statements from other physicians, and (2) the testimony of still other physicians in the trials in these cases. See 05-380 Pet. Br. 33-37; 05-1382 Pet. Br. 22-24. Respondents merely challenge selected pieces of that evidence, not the substantiality of the record as a whole, and their specific challenges in any event lack merit.

With regard to the other evidence in the legislative record, respondents suggest that the American Medical Association (AMA) and the American College of Obstetricians and Gynecologists (ACOG) actually held the view that partial-birth abortion was sometimes medically necessary. See, *e.g.*, Carhart Br. 34-35. Notwithstanding its ultimate decision to oppose the Act, however, the AMA repeatedly expressed the view that partial-birth abortion is never the only appropriate procedure to protect a woman's health. See 05-380 Pet. C.A. App. 758, 775, 1002, 1004. And while a select panel convened by ACOG did suggest that partial-birth abortion could in some circumstances be the "best" choice, it ultimately concluded that it "could identify no circumstances under which [partial-birth abortion] would be the only option to save the life or preserve the health of the woman." See 05-1382 J.A. 856-857, 860; 05-380 Pet. C.A. App. 1056, 1297. Consistent with those views, no one suggests that a doctor who refuses to perform a D&X abortion, but instead employs only the standard D&E procedure, is committing malpractice or operating outside the accepted standards of medical practice. There is therefore no bar to the legislature making the same judgment that any doctor can safely and responsibly make—to rule out the D&X procedure.

With regard to the trial testimony in these cases, respondents note that the district courts credited the testimony of their experts over the testimony of the government's. See, *e.g.*, Planned Parenthood Br. 7-8, 15-16. Even assuming the validity of those credibility determinations—and there is good reason to question them, see 05-1382 Pet. Br. 25-27—the credibility judgments of individual district court judges cannot trump the credibility judgments of Congress.[6]

d. Respondents heavily rely on the evidence they presented at trial, which in their view shows that partial-birth abortion is safer than other types of abortion either in specific circumstances or as a more categorical matter. The whole point of "substantial evidence" review, however, is that a reviewing court is required to defer to congressional findings even if the evidence is in conflict (and more than one conclusion could thus be drawn from that evidence). See, *e.g.*, *Turner II*, 520 U.S. at 208, 210. To the extent that the lower courts in these cases found that there was a division of opinion on the medical necessity of partial-birth abortion, see, *e.g.*, 05-380 Pet. App. 463a; 05-1382 Pet. App. 22a, 215a, the necessary implication is that there was, at least, *substantial evidence* to support Congress's finding that partial-birth abortion is never medically indicated.

In any event, the better view, based on the evidence in all three of the cases challenging the constitutionality of the Act,

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[6] Respondents contend that the government's own experts recognized that "the hypothesized risks of [partial-birth abortion] are overstated or speculative." Planned Parenthood Br. 19. Notwithstanding some isolated statements to the contrary, however, the trial and congressional records are replete with statements that partial-birth abortion carries greater risks of cervical incompetence, see, *e.g.*, 05-1382 J.A. 653-655, 776-779, 881; 05-1382 C.A. E.R. 145, 545, 579-580, 970, and hemorrhaging and infection, see, *e.g.*, 05-1382 J.A. 660-662, 938, 1013-1016; 05-1382 C.A. E.R. 145-146, 863, 971, and poses additional risks from the internal rotation of the fetus to a feet-first position, see, *e.g.*, 05-1382 J.A. 657-660, 937-938; 05-1382 C.A. E.R. 146, 545, 863.

is that partial-birth abortion is not safer than other types of abortion either generally or in any specific circumstance. With regard to safety generally, one of the district courts to have considered the issue found that "the Government's expert witnesses reasonably and effectively refuted Plaintiffs' proffered bases for the opinion that D&X has safety advantages over other second-trimester abortion procedures," and that "many of Plaintiffs' purported reasons for why D&X is medically necessary" are either only "theoretical" or simply "false." *National Abortion Fed'n* v. *Ashcroft*, 330 F. Supp. 2d 436, 479, 480 (S.D.N.Y. 2004), aff'd, 437 F.3d 278 (2d Cir. 2006) (*NAF*). While the plaintiffs in these cases have claimed that partial-birth abortions are generally safer than standard D&E abortions because partial-birth abortions present a lower risk of (1) cervical or uterine trauma, (2) retained fetal parts, (3) laceration from bony fragments, and (4) hemorrhage or infection, evidence presented at the trials suggested that each of those asserted safety benefits was hypothetical at best.[7] In response, respondents presented only anecdotal evidence and intuition, and no scientific evidence, to support their claims. While respondents relied on a peer-reviewed study led by a plaintiff in another of the three cases, Dr. Stephen Chasen, and based on abortions performed by Dr. Chasen and one of his partners, that study concludes that partial-birth abortion and standard D&E abortion had no significant differences in short-term complication rates, blood

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[7] See, *e.g.*, 05-1382 J.A. 148, 322, 880, 957-958 (risk of cervical or uterine trauma in standard D&E abortions was minimized by the use of smooth, rounded forceps and standard ultrasound techniques); *id.* at 148, 319-320 (risk of retained fetal parts was minimized by the use of ultrasound and by inspection of the uterus and inventory of removed parts); *id.* at 374 (risk of bony fragments was minimized by proper use of forceps); 05-380 J.A. 480, 484 (risk of hemorrhage or infection was the same in partial-birth abortion and standard D&E abortion because both result in similar blood loss).

loss, or procedure time[8]—and actually documents (albeit below a level deemed statistically robust) that the D&X procedure resulted in a higher rate of subsequent premature birth. 05-380 J.A. 479-494, 615-617; 05-380 Pet. C.A. App. 2114.[9]

With regard to safety in specific circumstances, the district court in *NAF* found that "[i]n no case * * * could Plaintiffs point to a specific patient or actual circumstance in which D&X was necessary to protect a woman's health." 330 F. Supp. 2d at 480. Numerous experts, including several of respondents' own experts, testified that there was no particular circumstance in which partial-birth abortion was medically necessary. See, *e.g.*, 05-1382 J.A. 536, 938-939; 05-380 C.A. App. 1377. It should be emphasized, as well, that the relatively long lead time necessary for sufficient dilation makes the D&X procedure particularly ill-suited for dealing with emergency health issues when time is of the essence. While respondents list various medical conditions for which they believe partial-birth abortion would be the safest abortion method, see, *e.g.*, Carhart Br. 6-7; Planned Parenthood Br. 20-22, the district court in *Carhart* was the only one that agreed

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[8] Although respondents contend that the Chasen study shows that partial-birth abortion is in fact safer because the median gestational age for women undergoing partial-birth abortions was higher than for women undergoing standard D&E abortions, see Carhart Br. 10; Planned Parenthood Br. 19, the Chasen study merely concluded that the complication rates from the two types of procedure appeared to be similar, without making any claim concerning the implications of any difference in gestational age. See 05-1382 J.A. 534. Moreover, other factors, such as the higher average age of the women undergoing the standard D&E procedure, would seem to point in the opposite direction.

[9] In an amicus brief in these cases, Dr. Chasen (together with the other plaintiffs in *NAF*) cites a later article in which he and his co-authors attempt to explain the evidence concerning the higher rate of subsequent premature birth. Br. 13. That article, however, was not written until 2005 and is not contained in the trial record in any of the three cases.

with respondents, and it did so only with respect to two conditions: placental cancer (in combination with preeclampsia) and placenta previa. See 05-380 Pet. App. 481a-482a. The underlying evidence on which that court relied does not support respondents' claims with regard to either of those conditions. As to placental cancer, the court cited the testimony of only one physician, Dr. Joanna Cain—but she based her conclusion that partial-birth abortion was the safest abortion method for such cases solely on statements made in the deliberations of ACOG's task force, see 05-380 J.A. 500, which ultimately concluded that it "could identify no circumstances under which [partial-birth abortion] would be the only option to save the life or preserve the health of the woman." 05-1382 J.A. 856. As to placenta previa, the court primarily relied on the testimony of Dr. Cassing Hammond—but he testified only that a D&E abortion would be safer than a hysterotomy in cases involving that condition, not that the D&X procedure would be safer than a standard D&E procedure. See 05-380 J.A. 749-750.

At a minimum, respondents' trial evidence concerning the medical necessity of partial-birth abortion was not so overwhelming as to render Congress's factual findings unsupported by substantial evidence. Those findings are therefore valid and entitled to deference.

C. Even Assuming That Partial-Birth Abortion Has Marginal Health Advantages In Some Cases, A Statute That Prohibits Partial-Birth Abortion Does Not Impose An Undue Burden On A Woman's Access To An Abortion

Even if the Court refused to defer to Congress's factual findings, it should conclude that the Act would not impose an undue burden on a woman's access to an abortion. Respondents do not appear to contend that partial-birth abortion is necessary for the preservation of the mother's health in the

sense that, when a mother *requires* an abortion for a non-life-threatening health condition, partial-birth abortion will be her only safe or practical option. That is unsurprising, because two of the three district courts to have considered the issue have squarely found that the plaintiffs in those cases failed to identify any such situation. See 05-1382 Pet. App. 147a; *NAF*, 330 F. Supp. 2d at 480. Moreover, respondents appear to concede that standard D&E abortions are generally safe—and respondents' amici expressly make that concession. See, *e.g.*, AMWA Br. 14 (stating that D&E by dismemberment is "extremely safe"); Chasen Br. 20 (stating that complications from D&E are "fortunately[] rare"). That is also unsurprising, because respondents' experts repeatedly testified that they considered standard D&E abortions to be "very" or "extremely" safe. See, *e.g.*, 05-1382 J.A. 132, 237, 265, 409. And there is no suggestion that doctors who perform only D&E abortions are endangering their patients or deviating from the appropriate standard of care.

The relevant constitutional question in these cases is therefore whether it would impose an undue burden on any given woman's right to an abortion to prohibit an inhumane and rarely used type of partial-birth abortion procedure when that prohibition does not deny the woman a safe abortion, including a safe late-term abortion, by a more common procedure. The answer to that question is clearly no. The Act implicates not only the government's compelling interest in protecting human life, but also the government's specific (and no less compelling) interest in prohibiting a particular type of abortion procedure that closely resembles infanticide. See, *e.g.*, *Stenberg*, 530 U.S. at 960, 962 (Kennedy, J., dissenting) (concluding that "Nebraska's ban on partial birth abortion furthers purposes States are entitled to pursue" and that "Nebraska was entitled to find the existence of a consequential moral difference between the [D&X and D&E] procedures").

Respondents and their amici contend that the latter interest is not compelling, or even legitimate, because it constitutes merely a "moral" interest. Planned Parenthood Br. 31-32; AMWA Br. 27-29; NWLC Br. 2-3. That is both mistaken and beside the point. The line between being *in utero* and being outside the womb has long been the line that separates abortion from infanticide. A law that reinforces that line in the class of abortions that take place just before viability clearly promotes the government's interest in protecting life. But even if the government's interest in avoiding the slippery slope to infanticide is somehow categorically different from the interest in protecting life, but cf. *Washington* v. *Glucksberg*, 521 U.S. 702, 728-735 (1997), the interest in promoting life could similarly be described as a moral interest. That interest, however, was described in the joint opinion in *Casey* as "substantial," "profound," and "important," see, *e.g.*, 505 U.S. at 871, 876, 878, and is the interest that underpins all of the government's valid abortion regulations. If the government was foreclosed from relying on "moral" interests in regulating abortion, it would be largely disabled not just from regulating late-term abortion procedures such as partial-birth abortion, but from regulating abortion altogether. That position is sharply at odds with the joint opinion in *Casey*, which emphasized that the "the State's important and legitimate interest in potential life * * * has been given too little acknowledgment." *Id.* at 871 (citation omitted).

D. To The Extent That The Court Believes That *Stenberg* Compels A Different Result, It Should Be Overruled

For the reasons explained above and in petitioner's opening briefs, the Court's decision in *Stenberg* is not controlling. If, however, the Court were to conclude that its decision in *Stenberg* compels the conclusion that the Act is unconstitutional, then *Stenberg* should be overruled.

As this Court has explained, "*[s]tare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). Particularly in constitutional cases, however, it is "common wisdom" that stare decisis is not an "inexorable command." *Casey*, 505 U.S. at 854. Contrary to respondents' arguments (Carhart Br. 35-37; Planned Parenthood Br. 29-31), several considerations weigh strongly against affording stare decisis effect to *Stenberg*.

As a preliminary matter, *Stenberg* is a recent and deeply divided decision that this Court has not followed in any other cases. *Stenberg* was grounded on a reading of another 5-4 decision, *Casey*, and was sharply criticized by one of the Justices in the *Casey* majority as an unjustified departure from that decision. See *Stenberg*, 530 U.S. at 956-957, 979 (Kennedy, J., dissenting). Even in the short time since its issuance, moreover, *Stenberg* has already proven to be unworkable in practice, as reflected in the different analytical approaches taken in the lower-court opinions that have attempted to apply it. This is true not only of courts considering the constitutionality of the Act, but also of courts considering the validity of other abortion regulations, which have reached conflicting conclusions as to, *inter alia*, whether *Stenberg* requires every abortion regulation to contain an express health exception and, if not, what evidentiary showing must be made before such an exception is required. See, *e.g.*, *Richmond Med. Ctr. for Women* v. *Hicks*, 409 F.3d 619, 622, 625-626 (4th Cir. 2005), petition for cert. pending, No. 05-730 (filed Dec. 1, 2005); *Women's Med. Prof. Corp.* v. *Taft*, 353 F.3d 436, 448 (6th Cir. 2003); *A Woman's Choice—East Side Women's Clinic* v. *Newman*, 305 F.3d 684, 688 (7th Cir. 2002), cert. denied, 537 U.S. 1192 (2003).

Moreover, if *Stenberg* really requires courts to engage in extensive evidentiary proceedings to second-guess congressional judgments about medicine, then it has proven unworkable by thrusting courts into a role for which they are institutionally ill-suited. It is one thing to require courts to ensure that Congress had substantial evidence, but it is quite another matter to force courts to engage in extensive factfinding to determine whether there is a sufficient consensus of medical opinion. This Court observed over a century ago that "[i]t is no part of the function of a court or a jury to determine," when medical opinion is divided, "which one of two modes was likely to be most effective for the protection of the public against disease." *Jacobson* v. *Massachusetts*, 197 U.S. 11, 30 (1905). Federal courts "are ill-equipped to evaluate the relative worth of particular surgical procedures," *Stenberg*, 530 U.S. at 968 (Kennedy, J., dissenting), and cannot sit as "the Nation's *ex officio* medical board[s]," *ibid.* (quoting *Akron I*, 462 U.S. at 456 (O'Connor, J., dissenting)).

Overruling *Stenberg* would not affect any relevant reliance interests, because it could hardly be said that "people have organized intimate relationships and made choices that define their views of themselves and their places in society[] in reliance on the availability" of the gruesome and rarely used procedure of partial-birth abortion. *Casey*, 505 U.S. at 856. Moreover, there could be no *reasonable* reliance on *Stenberg* here, because the extension of *Stenberg* that respondents seek would put it in conflict with numerous other decisions of this Court: most notably, but by no means limited to, the Court's decision in *Casey*. See *Stenberg*, 530 U.S. at 957, 960-963, 979 (Kennedy, J., dissenting); *id.* at 1005-1020 (Thomas, J., dissenting). Such a reading would mark a return to the strict scrutiny expressly abandoned in *Casey*; would extend that strict scrutiny to legislative judgments concerning health, despite a century of precedents employing a much more def-

erential analysis, see, *e.g.*, *Kansas* v. *Hendricks*, 521 U.S. 346, 360 n.3 (1997); *Jacobson*, 197 U.S. at 30; and would resurrect the *Akron I* requirement of near-absolute deference to the treating phy[illegible], which was overruled by the joint opinion in *Casey*, see [illegible] U.S. at 881-887. If *Stenberg* must be read to require a choice between *Stenberg* and all these other precedents of the Court, the Court should jettison *Stenberg* and preserve the latter.

II. THE ACT IS NEITHER UNCONSTITUTIONALLY OVERBROAD NOR UNCONSTITUTIONALLY VAGUE

A. The Act Is Not Unconstitutionally Overbroad

1. Unlike the statute in *Stenberg*, the Act defines "partial-birth abortion" in a way that unambiguously does not reach standard D&E abortions. The Act applies only where a physician "deliberately and intentionally vaginally delivers a living fetus" past a specified anatomical "landmark" and then "performs [an] overt act, other than completion of delivery, that kills the partially delivered living fetus"—and delivers the fetus with the purpose of performing that overt act. The Act thus excludes standard D&E abortions, in which the dismemberment of the fetus is not a discrete act from the delivery of a portion of the fetus and in which a major portion of the fetus is usually not delivered while the fetus is still living.

2. Respondents contend that, in a standard D&E abortion, a physician would like to deliver the fetus as intact as possible, and that, where the physician is able to remove most of the fetus but is unable to remove the fetus intact (*e.g.*, because the head becomes stuck), the physician must sometimes perform a partial-birth abortion instead (*e.g.*, by puncturing the fetus's skull and vacuuming out its brain). Carhart Br. 42-43; Planned Parenthood Br. 34-37. Indeed, the Planned Parenthood respondents go even further and make the novel suggestion that partial-birth abortion does not even exist as a dis-

crete procedure, because physicians always set out to remove as much of the fetus as possible. Br. 41. Under that view, D&X is not a distinct procedure, only a particularly "successful" variant of the D&E procedure. That suggestion, however, cannot be squared with the history of the partial-birth abortion procedure, which makes clear that partial-birth abortion was developed as a distinct type of procedure in which the physician intentionally seeks to achieve a greater degree of dilation than in a standard D&E abortion, for the specific purpose of removing the fetus intact. See *Stenberg*, 530 U.S. at 927-928; *id.* at 959-960 (Kennedy, J., dissenting); *id.* at 985-989 (Thomas, J., dissenting); cf. AMWA Br. 15 (noting that, in initially explaining the procedure of partial-birth abortion, the procedure's inventor "described both dilation techniques and intra-operative techniques used to maximize the possibility of intact removal"). That suggestion also defies the analysis of *Stenberg*, which faulted the Nebraska statute for failing to distinguish clearly between the D&X and D&E procedures (which would hardly be a failing if no meaningful difference existed). It likewise defies the innumerable references in the congressional and lower-court records to D&X and D&E as distinct procedures. Finally, that suggestion squarely conflicts with this Court's promise in *Stenberg* that a properly drawn statute could distinguish between D&X and D&E and validly regulate the former.[10]

3. Respondents contend that the Act is overbroad because it in fact reaches standard D&E abortions in which a physi-

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[10] It is undoubtedly true that partial-birth abortions are much rarer than standard D&E abortions. See, *e.g.*, *Stenberg*, 530 U.S. at 924-927, 929. But that does not mean they cannot be regulated. See *id.* at 964 (Kennedy, J., dissenting) ("It ill-serves the Court, its institutional position, and the constitutional sources it seeks to invoke to refuse to issue a forthright affirmation of Nebraska's right to declare that critical moral differences exist between the two procedures.").

cian does not set out to perform a partial-birth abortion, but ends up having to perform one anyway (and that the Act would therefore chill physicians from *ever* performing standard D&E abortions). Carhart Br. 44-45; Planned Parenthood Br. 42-44. In such cases, however, the physician would lack the required intent to be covered by the Act: *i.e.*, the specific intent, at the outset of the procedure, to deliver the requisite portion of the fetus for the purpose of performing the ultimate lethal act. Contrary to respondents' contentions, that interpretation is compelled by the text of the Act itself, which applies only where the person performing the abortion "deliberately and intentionally" delivers the requisite portion of the fetus "for the purpose" of performing the ultimate lethal act. It is clear from that compound mens rea requirement that the physician must have the "purpose" of performing the ultimate lethal act *at the outset of the procedure*—not that it is sufficient for the physician to *develop* that "purpose" once the procedure is underway. See 05-380 Pet. Br. 47-48; 05-1382 Pet. Br. 32-33. Where a physician originally intends to perform a standard D&E abortion, therefore, the physician will not be subject to the Act.

4. The Carhart respondents repeatedly contend that the Act "ban[s] some non-intact D&Es" because it would reach abortions in which a physician delivers the requisite portion of the fetus and only then performs a discrete act of dismemberment (and delivers the fetus with the purpose of performing that act). Br. 38; see Br. 2, 17, 41-42. The Planned Parenthood respondents, however, concede that there is no evidence that physicians ever perform such delivery-followed-by-dismemberment abortions. See Br. 41 n.34. And even if they did, there is no sense in which such abortions could be classified as *standard* D&E abortions; instead, such abortions are simply partial-birth abortions that are effectuated in a particularly gruesome manner. Because the Act does not reach any

standard D&E abortions, and because the Act does not reach partial-birth abortions carried out by physicians who had intended to perform standard D&E abortions instead, it is not unconstitutionally overbroad.

B. The Act Is Not Unconstitutionally Vague

1. Respondents renew their contention that the operative provisions of the Act more generally are unconstitutionally vague. Carhart Br. 45-47; Planned Parenthood Br. 44-47. As has already been shown, however, that contention fails because the Act unambiguously excludes standard D&E abortions (and, at a minimum, could reasonably be so construed), and otherwise precisely defines the conduct that it prohibits. The Carhart respondents do not contend that any specific phrases *within* the Act are impermissibly vague. While the Planned Parenthood respondents challenge the Act's use of the phrase "overt act," Br. 45, their real complaint is with the *breadth* of that phrase, rather than with its clarity. The phrase "overt act" plainly refers to any act distinct from the act of delivery, other than the "completion of delivery"—a statutory exception that is designed to exclude induction abortions. The phrase "overt act" is broad in reach precisely in order to ensure that a physician cannot evade the Act simply by performing an atypical lethal act: *e.g.*, by dismembering the partially delivered fetus, rather than crushing its skull. There is nothing vague about the phrase "overt act," or, for that matter, any other term or phrase in the statute.[11]

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[11] Amicus California Medical Association contends that the phrase "in or affecting * * * commerce" is impermissibly vague. Br. 4-18. As a preliminary matter, the plaintiffs in all three cases conspicuously failed to argue that the Act constituted an impermissible exercise of Congress's Commerce Clause authority—nor would such a challenge be likely to succeed, as CMA appears to recognize. See, *e.g.*, Br. 6-7 (discussing Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. 248). CMA's derivative vagueness argument is meritless, because the phrase "in or affecting * * * commerce" unambigu-

2. With regard both to the Act's asserted overbreadth and to its asserted vagueness, respondents fail to suggest any way in which Congress could have drafted the Act to remedy the alleged constitutional deficiencies. Indeed, respondents virtually acknowledge that, in their view, Congress could not draft *any* statutory language—including a ban on the D&X procedure, in terms—that would effectively regulate partial-birth abortion while navigating the Scylla and Charybdis of overbreadth and vagueness. See, *e.g.*, Carhart Br. 47 n.29. If, for example, Congress sought to address the Act's asserted overbreadth by passing a less specific statute that simply prohibited "partial-birth" abortions (or "D&X" or "intact D&E" abortions), respondents would undoubtedly argue that the statute was unconstitutionally vague—and indeed, insofar as they believe that partial-birth abortions and standard D&E abortions are not meaningfully distinct, would likely argue that the statute is still overbroad. If, on the other hand, Congress sought to address the Act's asserted vagueness by passing a statute that contained a different definition of "partial-birth abortion" (*e.g.*, by prohibiting only the "crushing of the fetus's skull," rather than an "overt act[] other than completion of delivery"), the resulting statute could readily be circumvented. At bottom, respondents' approach is irreconcilable with the position of a majority of this Court in *Stenberg*: namely, that a valid statute could be drafted to prohibit partial-birth abortion. See, *e.g.*, 530 U.S. at 951 (O'Connor, J., concurring).

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ously modifies the phrase "performs a partial-birth abortion," and the Act thus regulates partial-birth abortions to the full extent of Congress's Commerce Clause authority. See, *e.g.*, *United States* v. *Carter*, 981 F.2d 645, 646-647 (2d Cir. 1992) (rejecting similar vagueness challenge to 18 U.S.C. 922(g)).

C. The Court May Construe The Act To Avoid Any Conceivable Overbreadth Or Vagueness Deficiency

When it comes to respondents' overbreadth and vagueness arguments, these cases differ from *Stenberg* in another critical respect. Because these cases involve the interpretation of a federal statute, rather than a state statute, the Court may and, if it deems it necessary to do so, should construe the Act to avoid any constitutional deficiencies it might identify. For example, respondents' own arguments as to how a delivery-and-dismemberment procedure would not constitute a D&X amply justify Congress's decision to avoid that medical term in its prohibition. Cf. *Hendricks*, 521 U.S. at 359 (noting that "[l]egal definitions * * * need not mirror those advanced by the medical profession"). But if the Constitution requires the statute to prohibit the D&X procedure as such, the Act can readily be so construed. More broadly, as long as the Court applies the normal canons of constitutional avoidance, rather than the "canon of construction under which in cases involving abortion, a permissible reading of a statute is to be avoided at all costs," *Thornburgh* v. *American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 829 (1986) (O'Connor, J., dissenting) (internal quotation marks and citation omitted), there is no obstacle to construing the statute to avoid constitutional difficulty.

III. IF THE COURT HOLDS THE ACT UNCONSTITUTIONAL, IT MAY BE ABLE TO FASHION A NARROWER REMEDY THAN FACIAL INVALIDATION

Respondents also err in arguing that the Act must be invalidated in its entirety if the Court concludes it may be unconstitutional in *any* application.

1. As a preliminary matter, the Planned Parenthood respondents suggest that, in determining whether narrower injunctive relief is appropriate, a reviewing court should em-

ploy a presumption in favor of facial invalidation (and against narrower injunctive relief), on the ground that "Congress can always follow the Court's guidance and re-enact a law that conforms to the Constitution." Br. 48 n.38. But that suggestion is flatly inconsistent with this Court's decision in *Ayotte* v. *Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006), which made clear that the "normal rule" is to enjoin a statute only as to its unconstitutional applications, rather than to invalidate the statute facially as to *all* of its applications. *Id.* at 968. Such a presumption in favor of narrower injunctive relief makes eminent sense, because it ensures that a court will not "frustrate the expressed will of Congress or that of the state legislatures" by enjoining the enforcement of a law even in situations in which such enforcement is, or would be, constitutional. *Barrows* v. *Jackson*, 346 U.S. 249, 256-257 (1953).

2. Respondents contend that, to the extent that the Act is invalid because it lacks a health exception, the presumption against facial invalidation has been overcome because it is clear that Congress purposefully adopted a statute without a health exception. Carhart Br. 47-49; Planned Parenthood Br. 47-48. That contention too, however, would invert the *Ayotte* presumption. Anytime a constitutional defect results from the omission of a necessary exception, that omission will always be, at least to some extent, intentional. If that were enough to invalidate a law, the Court in *Ayotte* would have affirmed the facial invalidation of the statute at issue. It did not, because, under *Ayotte*, the relevant question is whether Congress would have preferred *no statute at all* to a statute with a (judicially crafted) health exception. See 126 S. Ct. at 968. Respondents' only answer is the non sequitur that Congress deliberately delayed passage of the Act for political reasons. See Planned Parenthood Br. 48. But even assuming that were true, it would say nothing about the substantive

scope of the Act. The better view, based both on Congress's statutory findings and the statements of various members, is that the proponents of the Act would have preferred to ban partial-birth abortion in at least some circumstances, even if they could not have banned it altogether. See 05-1382 Pet. Br. 43. That would be particularly true to the extent that a court could craft a narrow health exception applicable only to particular verifiable medical conditions, which would pose few, if any, of the concerns evident in the debate over a blanket health exception.

3. Respondents and their amici contend that narrower injunctive relief would nevertheless be inappropriate because (1) it would be difficult to predict what sort of health exception Congress would have wanted and (2) it would require the Court to anticipate all of the specific circumstances in which the Act could not constitutionally be applied. Carhart Br. 49; NARAL Br. 10-12. As to the first concern, however, given the abundant evidence that Congress would have preferred to prohibit partial-birth abortion to the fullest extent possible, it is safe to assume that Congress would have opted for the narrowest exception that meets constitutional requirements. And as to the second concern, it is the *plaintiffs'* obligation in a facial challenge to identify the specific circumstances in which the statute being challenged cannot constitutionally be applied (and in which the statute's application should therefore be enjoined). Any difficulty in identifying those circumstances here is attributable to the deficiencies in respondents' evidence. And to the extent that this Court were to conclude that any such circumstances existed, it could readily enjoin the Act's application in those circumstances—without foreclosing later plaintiffs from showing that the Act cannot constitutionally be applied in *other* circumstances (and that the Act thus should be enjoined in those circumstances as well).

4. Finally, respondents argue that any overbreadth or vagueness in the Act cannot be cured by a narrower injunction. Carhart Br. 49-50; Planned Parenthood Br. 49-50. As respondents acknowledge, however, insofar as their argument is that it would be impossible to craft an injunction that would clarify that the Act reaches only standard D&E abortions, that is just another way of saying that Congress cannot devise any statute that would permissibly prohibit the inhumane, and, in Congress's informed judgment, medically unnecessary, practice of partial-birth abortion. See, *e.g.*, *id.* at 50. As explained above, that position is at odds with this Court's prior decisions and should be rejected here. The promise of *Stenberg* was that the D&X procedure could permissibly be regulated. The Act as written is an example of such a permissible regulation, and the Court should resist respondents' invitation to revoke that promise through a misguided application of *Ayotte*.

CONCLUSION

For the foregoing reasons and those stated in petitioner's opening briefs, the judgments of the courts of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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